Nos. 38 and 39

In the Supreme Court of the United States

OCTOBER TERM, 1946

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

DONNELLY GARMENT COMPANY, DONNELLY GARMENT WORKERS' UNION AND INTERNATIONAL LADIES' GARMENT WORKERS' UNION

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, PETITIONER

v.

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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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Pursuant to leave granted at the oral argument in this case, this reply brief is filed in order that

there be no misunderstanding of the record which would prevent final disposition of this protracted litigation.

I

THE BOARD PROPERLY LIMITED TO ELEVEN THE NUMBER OF EMPLOYEE WITNESSES WHOM THE COMPANY AND THE D. G. W. U. WERE PERMITTED TO CALL DURING THE HEARING ON THE REMAND

The D. G. W. U., in its brief (pp. 5, 27, 29, 33, 61, 69), argues that the Board failed to comply with the remand of the court below because it did not, during the hearing held pursuant to remand, receive any of the witnesses offered by the D. G. W. U. on its examination in chief, and because it limited to eleven the number of employee witnesses the Company was permitted to call. The court below rejected both of these arguments. It said (XIII 41):

> Although the plant union complains that the Trial Examiner heard none of the employee testimony proffered by it, it is apparent that this testimony would have been no different than the testimony of the eleven witnesses produced by the Company and that the testimony received was for the benefit of both. * * * We are satisfied that the Examiner was justified in limiting the number of witnesses as he did.

Actually six of the eleven employee witnesses called by the Company were also named in the

D. G. W. U.'s offers of proof (Oma Cooper, whose earlier name, Holloway, VIII 2564, appeared on the offer III 767; Lois Barnes, III 771; Edith Dean, III 779; Ethel Riegel, III 773; Lydia Phillips, III 787; Alice Freed, III 779), and counsel for the D. G. W. U. examined each of the eleven witnesses extensively as to all matters set forth in its offers of proof.[1] The trial examiner made it clear throughout that he regarded these witnesses as produced by both the Company and the D. G. W. U. (IX 3179, 3183–3184, 3186, 3202, 3251, 3254–3255). And after the con-

[1] The following is a tabulation of the number of typewritten pages consumed by the respective examinations of each of these eleven witnesses by counsel for the Company and by counsel for the D. G. W. U. with supporting references to the printed record:

Name of witness	Number of typewritten pages of examination			
	By the Company	Record References	By D. G. W. U.	Record References
1. Oma Cooper	62	VIII 2564-2592	19	VIII 2592-2600
2. Hazel Saucke	48	VIII 2623-2641	51	VIII 2641-2665
3. Mary Warth	43	VIII 2709-2726, 2749-2752.	26	VIII 2726-2732, 2752-2754, 2760-2767.
4. Lois Barnes	87	VIII 2767-2814, 2845.	17	VIII 2814-2822, 2846-2847.
5. Edith Dean	40	VIII 2848-2868	22	VIII 2868-2879
6. Jessie Mudd	42	VIII 2911-2934, 3000, IX 3001	29	VIII 2934-2947, IX 3001.
7. Ethel Riegel	34	IX 3002-3020	13	IX 3020-3027.
8. Ruby Clayton	28	IX 3045-3057	20	IX 3057-3066.
9. Lydia Phillips	31	IX 3076-3094	13	IX 3094-3099
10. Louise Garrett	30	IX 3119-3135, 3166-3168.	26	IX 3135-3147, 3168-3169.
11. Alice Freed	64	IX 3169-3206, 3248-3249.	24	IX 3206-3219
Total pages	509		260	

clusion of the testimony of the eleventh employee witness, counsel for the D. G. W. U. expressly conceded that he had no witness to offer whose testimony would differ from that of those already produced (IX 3273).

The trial examiner acted within a proper exercise of his discretion in limiting the Company and the D. G. W. U. to eleven witnesses respecting the matters covered by their offers. He imposed a similar limitation upon the Board and the I. L. G. W. U. During the examination of the sixth witness called by the Board during the hearing upon remand, the trial examiner ruled that any further witnesses would be cumulative, that he would treat the witnesses called by the Board as included in the number the I. L. G. W. U. would be entitled to offer, and applying the same restriction to counsel for the I. L. G. W. U. that he applied to counsel for the D. G. W. U., would refuse to hear further witnesses for the Board or the I. L. G. W. U. (Tr. 6623; cf. X 3676).[2] The authorities are all agreed that a limitation such as eleven witnesses on each side of an issue is entirely proper, where the limitation is so imposed that neither

[2] On none of the points covered by the Company or the D. G. W. U. had the combined number of witnesses called by the Board and the I. L. G. W. U. on the first and second hearings exceeded eleven. This fact can be verified by checking the number of witnesses to whom reference is made in the statement of evidence supporting the Board's findings in the Board's main brief in this case, pp. 21–66.

party is caught with some of his best witnesses withheld.[3] Here both the Company and the D. G. W. U. were aware from the beginning of the hearing on remand that the Board did not contemplate hearing an unlimited number of witnesses. Moreover, at the time the trial examiner stopped them, counsel for the Company also admitted that he had no witness who would add anything different from the eleven who had already testified (IX 3272–3273).

II

THE COMPANY AND THE D. G. W. U. WERE PERMITTED AT BOTH HEARINGS TO INTRODUCE EVIDENCE AND EXAMINE WITNESSES RESPECTING ALL SUBJECTS AS TO WHICH THE BOARD AND THE I. L. G. W. U. INTRODUCED EVIDENCE

In their briefs, the Company (pp. 69–71), and the D. G. W. U. (p. 71), assert that the Board was permitted to question employees about events occurring prior to November 1936, while the Company and the D. G. W. U. were not permitted to put on any evidence as to events occurring that early. The court below held that the Board should have permitted the Company and the D. G. W. U. to introduce evidence to answer the Board's evidence that the Company had discriminated against I. L. G. W. U. members in 1934 and 1935 (XIII 47–48). In the Board's

[3] See discussion and cases collected in 6 Wigmore, *Evidence* (3rd ed.) secs. 1907–1908. Cf. American Law Institute, *Model Code of Evidence*, Rule 105 (c).

main brief (pp. 90–92) we have collected the record references showing that at the first hearing the Company was allowed to and did offer all the evidence it wished to meet these charges and at the hearing on remand was allowed unrestricted examination of Mrs. Reed on this issue.[4] The trial examiner refused during the hearing on remand to permit the Board to introduce any evidence as to the matters covered by the N. R. A. hearing. Indeed, he even refused to permit the Board to rebut the testimony given by Mrs. Reed during the hearing on remand which pertained to this issue (IX 3439–3445, X 3645–3649).

[4] The Company in its brief (pp. 75–76, 136, 137–138), accuses the Board of having dismissed all portions of its complaint pertaining to the pre-Act discharges but nevertheless making findings with respect thereto. As the trial examiner's rulings clearly demonstrate, he was dismissing only the allegations that the Company committed unfair labor practices by refusing after the Act became effective to reemploy persons earlier discharged (see allegations in the motion to amend the complaint, A 431–433), but was not ruling that the discharges in 1934 and 1935 were not still in issue insofar as they indicated the Company's hostility to the I. L. G. W. U. Thus, when this amendment to the complaint was offered, the trial examiner said he would withhold ruling on the motions to strike these allegations from the complaint until the parties could work out their offers of proof of the evidence taken in the N. R. A. hearing (Tr. 216–221). Counsel for the Company and the D. G. W. U. thereafter entered into a stipulation with the Board whereby each of the parties placed in the record excerpts from the N. R. A. and Judge Miller hearings in lieu of retrying *de novo* the issue of the Company's hostility to the I. L. G. W. U. in 1934 and 1935 (I 44–44a,

During the hearing on remand, the trial examiner permitted the Company and the D. G. W. U. to question and they did question the eleven employee witnesses produced under their offers of proof with respect to the organization of the Loyalty League at the Company's plant in February 1935 (VIII 2632–2633, 2666, 2718, 2727, 2734, 2777–2778, 2827, 2829–2830, 2859, 2861, 2927, IX 3010–3011, 3030–3032, 3052, 3066–3067, 3090), and to the asserted change in the status of the instructors when Bate became production manager in July 1935 (VIII 2812, 2830, 2861–2864, 2933, IX 3001). These were the only events occurring

273, II 389–390c, III 740–741; Tr. 315–317, 1746–1748, 1964). When counsel for the Company expressed doubt as to what he had to meet in the N. R. A. evidence, the trial examiner told him to bring in any evidence he was in doubt about and it would be ruled on (Tr. 1891). The trial examiner likewise made it clear that although he felt the Company should abide by its stipulation to put in pre-Act events by excerpts from previous hearings, if the Company wanted to put on additional witnesses they would be heard (II 394–395). And he did receive such testimony (II 398–401, Tr. 1907, 1967–1978, 1992–1993, 2009–2021). That the Company was not confused by the trial examiner's rulings is conclusively demonstrated by the extensive excerpts from the N. R. A. and Judge Miller hearings pertaining to the discharges in 1934 and 1935 which, subsequent to these rulings, it introduced in evidence (III 1110c–IV 1305, VI 1751–1753). Counsel for the Company, during the hearing on remand, asserted that the Company, during the first hearing, met all the evidence introduced by the Board from the N. R. A. record (IX 3443–3444). Nor has the Company ever shown that it had any specific evidence on these issues other than that already received.

prior to November 1936 as to which the Board was permitted to question witnesses during the hearing on remand, the Board being limited even as to these matters to cross-examination of the witnesses produced by the Company and the D. G. W. U. or to rebuttal of the testimony of employee witnesses produced by the Company and the D. G. W. U. (IX 3276–3311, 3427–3429, 3439–3445, X 3559–3571, 3573–3580, 3646–3649, 3673–3674).

In dealing with the admissibility of evidence that the I. L. G. W. U. allegedly admits instructors to union membership (Co. Br., pp. 80–86),[5] the Company attempts to create the impression that the issue of the supervisory status of instructors was not tried at the first hearing, but came into the case only when the Board, after rejecting the Company's evidence on the remand, itself put in extensive testimony as to whether employees regarded instructors as supervisors (Co. Br., pp. 84–85). Actually the issue of the supervisory status of the instructors was fully litigated at the original hearing (I 15–20, 22–24a, 25, 41, 135–139,

[5] In the course of this discussion, the Company lists among those whom it says the Board found to be representatives of management "Examiners" (Co. Br., p. 80) and the "inspectors" (Co. Br., p. 81) and cites Board cases to show that the Board on other occasions has held examiners and inspectors not to be supervisors (Co. Br., pp. 82–83). Actually the Board made no finding in the instant case that examiners or inspectors were supervisors or representatives of management, there never having been any claim made in this case that they were.

191–192, 239, 299–302, II 391–392, 411–412, 414–415, 419–423, 426–429, 450–453, 490–493, 504–512, 515, 517–519, 670, III 734c, 734g, 734j, 734k). When the first employee witness called by the Company and the D. G. W. U. during the hearing on remand was questioned with respect to the supervisory status of the instructors (VIII 2584), counsel for the Board objected to the question as not within the scope of the remand (VIII 2584–2586). The trial examiner ruled that he would construe the offers as permitting the employee witnesses to give their opinion of the instructors' supervisory status (VIII 2586) and each of the eleven employee witnesses called by the Company and the D. G. W. U. were permitted to testify as to his opinion of the instructors' status (VIII 2586–2587, 2604–2606, 2731, 2734, 2812, 2830, 2843–2844, 2861–2864, 2933–2934, 2956–2969, IX 3001, 3019, 3059–3060, 3092, 3103–3104, 3122, 3153, 3206–3207).[6] It was only thereafter that the attorney for the Board was permitted by way of rebuttal to call as witnesses the two instructors under whom the majority of the employees called by the Company and the D. G. W. U. had worked in March

[6] The Company, in its brief (pp. 143, 144, 148, 150), repeatedly emphasizes that the instructors were not "over" the operators. However, in referring to instructors and thread girls, employees called by the Company and the D. G. W. U. continually spoke in terms of "worked under" or "worked for" her (VIII 2602, 2605, 2611–2613, 2680, 2948, IX 3034, 3059).

and April 1937,[7] and to question them as to whether they regarded themselves and were regarded by others as having supervisory status at that time (IX 3320–3328, 3397–3398, 3410–3412, 3434). Thereafter, the attorney for the Board also called in rebuttal three employees who had worked in these sections at that time and similarly questioned them (IX 3470, X 3481–3483, 3551, 3554–3556, 3662, 3673–3675).

III

THE BOARD'S FINDINGS ARE SUSTAINED BY SUBSTANTIAL EVIDENCE

Despite the vigorous attacks made by the Company (Br., pp. 99–196) and the D. G. W. U. (Br., pp. 92–125) upon the Board's findings, we submit that the evidence cited in the Board's brief (pp. 22–71) affords full support for each finding there set forth. It would serve no good purpose to make a detailed defense of each citation attacked. We merely wish to urge the Court to examine even references which the Company asserts contain no mention of the subject for which they are cited. For instance, on page 130

[7] Eight of the eleven employee witnesses called by the Company and the D. G. W. U. testified that they had worked in the sections of Instructor Dorsey or Skeens at approximately this time (VIII 2607, 2676–2677, 2733, 2823, 2892, IX 3034–3035, 3059, 3074, 3097), and Dorsey (IX 3274–3276, 3310–3312) and Skeens (IX 3429) in turn testified that these girls were working in their respective sections at this time.

of the Company's brief, it is asserted that "At II, 588, there is nothing said about the letter" although in fact on II, 588, it appears that Atherton, a witness called by the Company, during the course of cross-examination, twice volunteered information respecting the reading of the letter in exact accord with the finding of the Board which the Company is at that page of its brief attacking.[8]

However, with respect to certain of the findings under attack, the corroborative details of the supporting evidence may not be apparent by an examination of the citations to the supporting evidence as set out in our main brief. We, therefore, wish to set out such details as to a few of the most controverted findings.

A: THE APRIL 27, 1937, MEETING

Rose Todd, who presided at the April 27, 1937, meeting and became president of the D. G. W. U. (III 821–830), claimed to have called the meeting by having the Company's telephone operators phone each section of the plant on the interdepartmental phones (V 1274d). She testified that it is the duty of the instructor or thread girl to

[8] It is to be noted that in one of its offers of proof (III 785) the D. G. W. U. also sought to establish the facts respecting the reading of this letter to be just as the Board found them. When one of the witnesses whose name purports to be attached to this offer (III 787) was called as a witness by the Company, she testified contrary to the offer (IX 3086–3087, 3110–3119) and then denied her signature (IX 3111–3112).

answer the phone and convey any message received to the girls in her section and that this was done on April 27th (V 1374d).[9] McConaughey, treasurer of the D. G. W. U. (II 692) and the first witness called by the D. G. W. U., testified that the telephone operator called his department and asked that people in the department be informed of the meeting (II 704g). Collins, an instructor called as a witness by the Company, remembered that the message was taken by either herself or the thread girl (II 667, 669). Instructors Dorsey and Skeens both testified that they received such a phone call on April 27th and notified the employees in their section that they were to attend the meeting (IX 3276, 3309–3312, 3315–3316, 3397–3399, 3430–3434, 3467). Operators Fike, Copenhaver, Weilert and Stevens each testified that she was sent to the meeting by her instructor (I 328c–328d, IX 3470, X 3551, 3619–3621, 3667). In view of Todd's testimony that she used this method of calling the meeting, cor-

[9] In an effort to mitigate the effect of the testimony that Todd used interdepartmental phones to call meetings of the D. G. W. U., the Company questioned the first employee witness called by it during the hearing on remand as to whether employees could freely use the phones at the Company's plant and she testified that they could (VIII 2587). On cross-examination of this witness it became clear that the only phones employees could use were public phones on the second and seventh floors, and that there were always long lines of employees waiting to use these phones (VIII 2621–2622). The interdepartmental phones could only be used by supervisory employees for Company business (IX 3342, X 3672).

roborated by such a wealth of additional testimony, the Company's belittling (Co. Br., pp. 104–107) of the Board's finding that employees were notified of the April 27th meeting by their instructors (X 3872), seems completely unjustified.

The Board's finding that the April 27th meeting was held during working hours (X 3867, n. 33, 3872) is sustained by the direct testimony of Instructors Dorsey and Skeens, who testified not only that the meeting was during working hours but that they had seen entries on the pay roll records disclosing that piece work employees were paid for the time they spent in attendance at this meeting (IX 3312–3315, 3329–3330, 3337, 3408–3410, 3430–3431, 3434, 3465–3468).[10] Operators Fike, Copenhaver, Weilert and Stevens also testified that this meeting was held during working hours (I 328c–328e, IX 3470–3471, X 3530–3532, 3541–3544, 3551, 3620–3621, 3667). The Company's pay roll shows that during the last two weeks of April 1937, the plant instructors and thread girls were paid for 26 hours overtime or 53 hours of work a week (III 1003–1004), and a thread girl called as a witness by the Company conceded that instructors and thread girls were never paid overtime except when their section also was working the additional hours (VIII 2986–2989).

[10] The Company produced no payroll records to controvert this testimony although it had the records for this period (XII 4204–4321).

The Board's finding that this meeting was held during working hours is moreover corroborated by the testimony that all of the meetings of plant employees during March,[11] April, and May, 1937 were held during working hours and that employees were paid for time spent attending these meetings (I 309, 328c–328d, IX 3312–3315, 3328–3330, 3408–3411, 3414, 3431, 3434, 3449–3451, 3458, 3465–3467, X 3543, 3669–3670).[12] Witnesses recalled numerous incidents which could not possibly have occurred had these meetings been held after working hours. For instance, there is Stevens' testimony that because she was the first

[11] Rose Todd herself never testified that the March 18, 1937 meeting was after working hours. Indeed, when questioned as to whether she got permission to hold this meeting during working hours, she did not deny it was held during working hours but stated that she had not asked permission and didn't know whether anyone else had secured permission (I 49).

[12] While Instructors Dorsey and Skeens were not able to be certain whether some of these were D. G. W. U. meetings rather than Loyalty League meetings (IX 3314–3315, 3361, 3363, 3454–3455), their uncertainty does not detract from their testimony but merely reinforces the Board's findings that the March 18 and April 27 meetings were sponsored by the Loyalty League and, in view of Rose Todd's presidency of the League and its use of the same system of calling meetings and the same meeting place, employees in attending the March 18 and April 27 meetings would reasonably be subject to all the compulsions inhering in Loyalty League activities (X 3867, 3868, 3872, 3875, n. 44, 3886). See also the minutes of the meeting of the D. G. W. U. on May 27, 1937, which was immediately followed by a Loyalty League meeting (III 952–958, I 354d–354g, 365, 368–369, II 378a–378d, X 3661). Cf. X 3662.

employee back at work following one of these meetings, her instructor accused her of not having been present (X 3670). The instructor named by Stevens was not called to deny this incident. Instructor Skeens also recalled going back to work after several D. G. W. U. meetings (IX 3450, 3458). Then there is the testimony of Instructor Dorsey that she reassured girls who did not wish to attend the meetings that they would be paid, and that then the girls went without complaint (IX 3410). Instructor Dorsey also recalled putting away the work of certain of the girls in her section on one occasion when the meeting began during working hours but did not finish until closing time (IX 3363, 3410–3411, 3414). The witnesses called by the Board remembered wearing their uniforms to the March 18, April 27 and some four or five other D. G. W. U. meetings held during April or May (I 328d, IX 3312, 3317, 3363, 3410, 3430, 3434, 3470–3471, X 3502–3503, 3530, 3551, 3666, 3667).[13]

B. THE ALLEGED MEETING OF MARCH 30, 1937

Both the Company (Br., pp. 20–21, 92–93, 117) and the D. G. W. U. (Br., pp. 19, 106–107) vigor-

[13] A newspaper picture of the May 11, 1937 meeting shows all visible persons to be in uniform (XI 4099, IX 3473–3474), although many witnesses called by the Company and the D. G. W. U., in explaining that all meetings were after work, described how they and many other employees changed into street clothes before the meetings (VIII 2572, 2728, 2818, IX 3060, 3099).

ously attack the Board's finding that no meeting took place on March 30, 1937 (X 3873, n. 42). In resolving the conflicts of testimony respecting this meeting, the Board pointed to the following evidence: None of the witnesses called by the Board remembered any meeting prior to April 27, 1937, at which funds were raised to pay Mr. Tyler a fee (I 332, IX 3316–3317, 3432, X 3552). Instead, they fixed the March 18, 1937 meeting as the one preceding the April 27, 1937 meeting (X 3666–3667). Rose Todd, who first testified that there was such a meeting, explained it as the source of the funds used to pay Tyler's fee (I 177–180) and did not disclose what later became apparent when bank records were introduced, that she had borrowed $1,000 from the First National Bank and that the check for $500 given Tyler on April 1, 1937 actually came from this source (II 378m–378p, II 556–557, III 949, 959, I 279–280). Moreover, the Board produced minutes of a meeting held on May 27, 1937 which shows that it was at a Loyalty League meeting on this date that employees decided to contribute 50 cents apiece to reimburse the Loyalty League treasury for the amount paid to Tyler (III 954–95[illegible] I 354d–354g, 365, 368–369, II 378a–378d, X 3671). The Company and the D. G. W. U. at first sought to discredit these minutes by producing records of the Loyalty League to show that $623.20 which its treasurer claimed had been contributed by employ-

ees in 50-cent donations was deposited in the bank on May 13, 1937 (II 378s–378z, III 991, Tr. 1775–1789, 1792–1796). However, upon obtaining the bank records, it was established that the sum of $623.30 was deposited on July 13, 1937 (III 960, II 384, Tr. 1775–1779, 1841–1842).

The testimony of the witnesses called by the Company and the D. G. W. U. was obviously based upon these employees' assumption years later that they must have contributed the money before the check was given to Tyler on April 1, 1937, as none of them had ever been told of Rose Todd's borrowing of the money (VIII 2698, IX 3040, 3075–3076, 3165, 3242, 3247–3248). Thus Saucke, who testified at the trial that she had never heard of Todd's loan from the bank (VIII 2698), claimed that she moved the assessment at the meeting on or about March 30 for paying the fees (VIII 2630–2631, 2668–2669, 2672–2673, 2697–2698). When Saucke was first examined on cross as to whether she made a motion in March 1938 to assess each employee a dollar to pay Mrs. Tyler's fees, she had no recollection of making such a motion, but when confronted with the minutes of the March 1938 meeting showing such a motion, she claimed to remember that she had made such a motion both in March 1937 and again in March 1938 (VIII 2672–2674, 2679, 2695, III 866–868). It seems probable that she only made the motion in 1938 and had just confused the year when trying to recollect in 1942 the facts of such earlier events.

IV

THE BOARD PROPERLY ORDERED REIMBURSEMENT OF DUES CHECKED-OFF TO THE D. G. W. U.

The Company (Br., pp. 194–195) attempts to distinguish the instant case from *Virginia Electric & Power Co.* v. *National Labor Relations Board*, 319 U. S. 533, wherein this Court sustained the Board's power to order reimbursement of dues checked off to a company dominated union in which membership was coerced by a closed-shop contract. The Board in this case found (X 3893–3894) that—

> The check-off agreement, a device by which the respondent assured the financial stability of the dominated organization, could, as practiced, no more be avoided by the employees than could the compulsory membership requirement. * * * the monies thus deducted from the wages of the employees constituted the price of retaining their jobs, a price coerced from them for respondent's purpose of supporting and maintaining the organization which respondent had dominated in order to thwart bona fide representation. * * * as a result of the imposition of the illegal closed-shop and check-off requirements, the employees suffered a definite loss and deprivation of wages equal to the amounts exacted from them for illegal purposes.

These findings are fully sustained. The check-off authorizations were all entered into subsequent

to the signing of the closed-shop agreement (see Bd. Br., pp. 60–61). They were prepared by the Company and signed in the plant at the desk of Rose Todd (I 226–227, 233–234, 262–263) a management representative and supervisory employee (see Bd. Br., pp. 28–32). There was testimony by employees that they did not sign such papers freely because they felt that if they didn't sign all such documents or pay their dues they would lose their jobs (X 3528, cf. IX 3471, X 3612, 3665, 3667). Cf. *National Labor Relations Board* v. *Baltimore Transit Co.*, 140 F. 2d 51, 56–59 (C. C. A. 4), certiorari denied, 321 U. S. 795.

Respectfully submitted,

J. HOWARD MCGRATH,
Solicitor General.

STANLEY M. SILVERBERG,
Special Assistant to the Attorney General.

GERHARD P. VAN ARKEL,
General Counsel,

MORRIS P. GLUSHIEN,
Associate General Counsel,

RUTH WEYAND,
FANNIE M. BOYLS,
Attorneys,
National Labor Relations Board.

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